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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

Nos. 73-1741

ALPHONSE PERSICO,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

JERRY LANGELLA,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

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In the

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Nos. .....

Alphonse Persico,

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PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit affirming petitioner Persico's adjudication of contempt is reported at 491 F.2d 1156 and is set out in the Appendix, *infra,* at pp. 1a-14a. The oral findings of the district court (Judd, D.J.) adjudging Persico in con-

tempt are unreported and are set out in the Appendix, *infra*, at 46a.

The oral findings of the district court (Dooling, D.J.) adjudging petitioner Langella in contempt are unreported and are set out in the Appendix, *infra*, at 51a-65a.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit affirming petitioner Persico's contempt adjudication was entered on February 19, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

The judgment of the United States District Court for the Eastern District of New York adjudging petitioner Langella to be in contempt was entered on April 17, 1974. A notice of appeal to the United States Court of Appeals for the Second Circuit was filed on April 25, 1974. The record was docketed in the Court of Appeals on May 13th, 1974. Certiorari is sought prior to judgment in the Court of Appeals pursuant to 28 U.S.C. §2101(e). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

(1) Is a grand jury witness entitled to litigate the legality of electronic surveillance in defense to a contempt citation, where it is conceded that the witness is being questioned as a result of electronic interception of his own conversations?

(2) Is a grand jury contemnor entitled to a suppression hearing to determine whether 18 U.S.C. §2515 has been vio-

lated by the disclosure of allegedly unlawful electronic interceptions to that grand jury?

(3) Is a summary contempt adjudication under 28 U.S.C. §1826(a) sufficiently criminal in nature so as to require the notice and hearing provided for in Rule 42(b) of the Federal Rules of Criminal Procedure?

(4) Was the explanation of the scope of the immunity given by government counsel to petitioner Persico sufficiently incomplete so as to require vacating the order of contempt?

Constitutional Provisions and Statutes Involved

These cases involve the Fourth, Fifth and Sixth Amendments to the United States Constitution; Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. §211 [18 U.S.C. §§2510-2520]; the Organized Crime Control Act of 1970, 84 Stat. §935 [specifically, 18 U.S.C. §3504 and 28 U.S.C. §1826(a)]; 18 U.S.C. §6002, 84 Stat. §927; and Rules 41(f) and 42(b) of the Federal Rules of Criminal Procedure.

Statement of the Case

A. *Persico*

In the spring of 1973 an electronic surveillance device was installed in Alphonse Persico's home. As required by 18 U.S.C. §2518(8)(d), petitioner later received notice of this surveillance.[1]

[1] Petitioner commenced a civil action in the United States District Court for the Eastern District of New York in August 1973 to compel disclosure of the electronic surveillance and to suppress

Subsequently, in December 1973, petitioner was served with a subpoena requiring him to appear before the Special September 1972 grand jury in the Eastern District of New York, returnable on January 23, 1974.[2]

On that date, Persico appeared and was sworn as a witness. After asserting his Fifth Amendment privilege not to testify, Persico was informed that immunity had been conferred on him by order of the Honorable John R. Bartels, U.S.D.J. on December 28, 1973 (19a, 23a).[3]

Persico then refused to answer on the ground that the questions being put to him as well as his very presence as a witness were the fruits of unlawful electronic surveillance of his home. Persico specifically relied on 18 U.S.C. §2515, Rule 41f, of the Federal Rules of Criminal Procedure, and the opinion of the Honorable John F. Dooling, U.S.D.J., issued on January 2, 1974, in *In re Vigorito,* 368 F. Supp. 613 (E.D.N.Y.) (24a-25a).

The government acknowledged that electronic surveillance devices had been installed at Persico's home pursuant to a court order signed March 21, 1973 authorizing interceptions for 15 days (38a). Extension orders were

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its use against him. In a memorandum opinion, the Hon. John F. Dooling, U.S.D.J., held that the application was premature since there was no anticipated use of the electronic surveillance which could be ordered suppressed. See, *In re Persico,* 362 F. Supp. 713 (E.D.N.Y. 1973).

[2] Persico's subpoena was originally returnable in December 1973 and was adjourned on Persico's application until January 9, 1974. On that date the grand jury did not obtain a quorum. Although Persico was not sworn as a witness, the Honorable Orrin G. Judd, U.S.D.J., heard Persico's applications on that date.

[3] Numbers designated "a" in parentheses refer to pages of the Appendix, *infra.*

signed on April 9 and May 8, 1973, each authorizing interceptions for 15 days (38a).

Petitioner first declined to answer the following question:

> "Question: Mr. Persico are you employed" (27a)?

The district court held that there was an insufficient showing that the particular question was predicated upon the surveillance of Persico's home and therefore ordered Persico to respond (28a-29a). Persico returned to the grand jury and then answered all questions concerning his lawful employment (30a-33a). After this series of questions Persico was asked:

> "Question: Are you employed in any other occupation or do you own any business" (33a)?

Persico again refused to answer on the ground that the questions relating to his employment were the fruits of unlawful electronic interceptions (33a). Government counsel admitted that the proposed questions were based on electronic surveillance:

> "Mr. Del Grosso: There are questions that have been formulated as a result of electronic surveillance which will deal with his employment. Yes, that is true, your Honor" (29a).

Persico then moved for production of the surveillance orders and supporting affidavits for inspection so that counsel could make a determination whether the witness had "just cause," within the meaning of 28 U.S.C. §1826 (a), to refuse to answer based on the facial invalidity of the orders (34a-36a). The Court refused this relief

and instead examined the orders *in camera*, a procedure which Persico contended was inadequate (40a-41a).

In part, the Court bottomed its action on the theory that *Gelbard* v. *United States*, 408 U.S. 41 (1972), had been limited by *United States* v. *Calandra*, —— U.S. ——, 38 L. ed.2d 561 (1974), thus rejecting Persico's contention that *Calandra* specifically exempted from its holding the statutory remedy of §2515 and that the opinion therein was bottomed exclusively on the Fourth Amendment. It then denied Persico's motion to suppress (41a).

Persico was ordered to return to the grand jury and answer the question. This he did (41a). Persico answered questions pertaining to his own gambling activities (42a). He was then asked:

> "Question: The question was, who were the individuals who worked for you" (42a)?

Persico refused to answer this question on the ground that he believed it derived from the unlawful electronic surveillance of his home and on the ground that the immunity conferred, as explained, was not commensurate with his Fifth Amendment privilege (43a-44a).

Persico was again brought before the district judge who held him in contempt pursuant to 28 U.S.C. §1826(a) and sentenced him to 60 days in jail. Counsel then moved for a hearing pursuant to Rule 42(b) F.R. Cr. P. (46a). The court ordered a hearing but remanded Persico (46a). The court indicated that Persico could purge the contempt before the expiration of the 60 days by answering (46a). The court further directed that the contempt was being imposed pursuant to 28 U.S.C. §1826(a).

On the following day, at a hearing, Persico attempted to defend against the contempt citation by demonstrating that the questions put to him were the fruits of unlawful electronic surveillance in violation of 18 U.S.C. §2515. Persico again renewed his motion to suppress seeking production of the surveillance orders and supporting papers. The application was again denied as was Persico's application for bail pursuant to 28 U.S.C. §1826(b)(5a-6a). On January 28, 1973, the United States Court of Appeals for the Second Circuit denied Persico bail but directed that Persico's appeal be heard on an expedited basis (6a), which it was on February 5, 1974.

On February 19, 1974, the Court of Appeals rendered its opinion affirming the order of contempt and imprisonment against Persico.

In March, 1974, applications for bail pending certiorari were denied by both Mr. Justice Marshall and, following referral to Mr. Justice Douglas, by the full court respectively. See 39 L. ed.2d 868.

On March 12, 1974, following petitioner's release from custody, the Hon. Jacob Mishler, Chief United States District Judge for the Eastern District of New York, signed an order extending the life of the grand jury of which Persico was adjudged to be in contempt.

It was this extended grand jury before which petitioner Langella was subpoenaed to appear.

B. *Langella*

In April 1974, petitioner Langella was also served with a subpoena, returnable April 17, 1974, also directing him to appear before the Special September 1972 grand jury in the Eastern District of New York. Following his en-

trance into the grand jury and the administering of the oath and the conferring of immunity, petitioner Langella read the following statement to the grand jury:

> "I believe that my voice has been recorded and that this investigation and the questions that are to be asked of me are based upon information obtained as a result of the electronic interception of my conversations.
>
> "I, therefore, respectfully ask to be taken before a District Court Judge to be advised whether my conversations have been electronically intercepted and, if so, whether it is based upon a Court Order and Affidavit.
>
> "I respectfully request that a hearing be held pursuant to Title 18, United States Code, Section 2515 to determine the validity of its execution.
>
> "Upon information and belief, I believe that my conversations have also been recorded by the State of New York or the District Attorney's Office of New York County or the Police Department of the State of New York. I believe that this investigation and the questions to be asked of me are also based in full or in part on that electronic interception.
>
> "I, therefore, request that I be advised before a District Court Judge as to whether or not such interception has taken place and, if so, I request that I be advised whether such interception was based on a Court Order and, if so, I request that a hearing be held to determine the validity of that Order and its execution or, in the alternative, any such Order be submitted to this Court for examination. I assert all of these rights under the *Egan* and the *Gelbard* cases" (21a).

Thereafter, Langella, his counsel, and government counsel appeared before Judge Dooling. Pursuant to 18 U.S.C. §3504(a)(1) and this Court's opinions in *Gelbard* and *Egan* v. *United States*, 408 U.S. 41 (1972), Langella requested the government to affirm or deny whether the questions to be propounded to him were based upon electronic surveillance.[4] The government reluctantly conceded that "some of the questions" would be (54a).

Following this admission by the government, counsel for Langella requested Judge Dooling to examine, *in camera*, the orders authorizing the surveillance of Langella. Al-

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[4] Unlike Persico, Langella was never formally served with an inventory pursuant to 18 U.S.C. §2518(8)(d), although the government had attempted to do so (57a). However, in December 1972, Langella was subpoenaed to appear before a New York state grand jury. Langella commenced an action in the New York state courts to quash the state subpoena similar in nature to the motion which was the subject of Judge Dooling's opinion in *In Re Persico*, *supra*. Langella's motion to quash was denied. However, the state prosecutor admitted during argument on the motion to quash that Langella's voice had been intercepted by a surveillance device which had been installed pursuant to a state court order. P. 7, transcript of Proceedings on Motion to Quash in *Langella* v. *New York*, —— N.Y.S.2d ——, No. 25584-72 (Sup. Ct. N.Y. Dec. 19, 1972). Langella was eventually indicted for his refusal to answer certain questions before the state grand jury. Motions to dismiss that indictment on *Gelbard* grounds are now *sub judice* in the New York State courts.

During the course of the arguments below on Langella's federal contempt, it was revealed that questions were also to be propounded to Langella in the federal grand jury based upon his testimony in the state grand jury. Thus, the federal prosecutor's statement (54a) that he was not intending to question Langella on the basis of any state intercepts, while technically correct, was misleading. If the questions propounded to Langella in the state grand jury were admittedly based upon electronic eavesdropping and the federal prosecutor intended to question Langella in the federal grand jury on the basis of the state grand jury proceedings, it can hardly be contended that the fruits of a state interception were not being utilized before the federal grand jury.

though this procedure had been followed by Judge Judd in the case of petitioner Persico, see 491 F.2d at 1158 (39a), Judge Dooling declined to do so (58a). Counsel for Langella then raised a number of other legal objections to the subpoena and the proposed grand jury questioning which are not the subject of the instant petition. These motions were also denied. Langella was then directed to again appear before the grand jury, which he did (59a).

Upon his appearance before the grand jury, Langella refused to testify on grounds relating to [illegible]ed insufficiency in the immunity granted. (This issue is not here raised by Langella.) Motions to quash on this ground were also denied and Langella again returned to the grand jury.

One hour later, Langella, his counsel and the government prosecutor appeared before Judge Dooling. The government requested that Langella be cited for contempt pursuant to 28 U.S.C. §1826(a) on the ground that Langella had, ironically, refused to answer the following question:

"Do you know Alphonse Persico" (61a)?

Following the interposing of defenses other than those related to electronic surveillance, Langella was adjudged to be in contempt pursuant to 28 U.S.C. §1826(a) and sentenced to imprisonment for the life of the grand jury. Bail pending appeal was denied (65a). Petitioner Langella is presently incarcerated.

Proceedings Below

On appeal to the United States Circuit of Appeals for the Second Circuit, petitioner Persico's adjudication of contempt was affirmed.

Following Langella's remand, he filed a Notice of Appeal to the United States Court of Appeal for the Southern Circuit and timely docketed the record in that court. However, since his arguments relating to unlawful electronic surveillance are foreclosed by that circuit's prior decision in the case of petitioner Persico, Langella seeks review solely of this question prior to judgment in the Court of Appeals pursuant to 28 U.S.C. §2101(e).

In its opinion, the Court below conceded that this Court's decisions in *Gelbard* and *Egan* permitted an immunized grand jury witness to refuse to answer a question derived from "concededly" unlawful electronic surveillance and to defend against any contempt citation for such a refusal. 491 F.2d at 1160 (7a). However, relying principally upon the concurring opinion of Mr. Justice White, in *Gelbard*, the court below went on to hold that,

> " . . . when, during grand jury proceedings, the government does produce a court order the traditional notion that the functioning of the grand jury system should not be impeded or interrupted could prevail at that time over the witness's interest in exploring in depth the validity of the surveillance." 491 F.2d at 1160 (8a).

This conclusion, the court below asserted, was supported by both the legislative history of 18 U.S.C. §2518(10)(a)

as well as this court's opinions in *United States* v. *Calandra*, —— U.S. ——, 38 L. ed.2d 561 (1974) and *United States* v. *Dionisio*, 410 U.S. 1 (1973).

The court below concluded that,

> "... the refusal [to testify] would be permissible only if there is any absence of a necessary court order or if there is a concession from the government that the surveillance was not in conformity with statutory requirements or if there is a *prior* judicial adjudication that the surveillance was unlawful." 491 F.2d at 1162 (12a).

By reason of Judge Judd's *in camera* inspection of the orders, the court below reasoned the petitioner Persico received "all that he was entitled to receive." *Id.* Petitioner Langella was not afforded even this minimal review (58a).

The Court of Appeals also rejected Persico's arguments that a §1826(a) contempt is sufficiently criminal in nature so as to require a notice and hearing pursuant to Rule 42 of the Federal Rules of Criminal Procedure and that the immunity conferred upon him, as explained, was not coextensive with his Fifth Amendment privilege.

REASONS FOR GRANTING THE WRIT

I.

The decision below emasculates this Court's decision in *Gelbard* and *Egan* and is based upon misreadings of the opinions in *Calandra* and *Dionisio* and the legislative history of Chapter 119 of Title 18 of the United States Code.

These cases present important issues concerning the rights of a grand jury witness to refuse to answer questions based on unlawful electronic surveillance and the scope of the witnesses rights to litigate the legality of such surveillance.

The operable facts are not in dispute. Petitioners were overheard by electronic eavesdropping devices and were then subpoenaed before a grand jury and refused to answer questions on the ground that the questions were the product of unlawful electronic surveillance. The government has conceded that the questions asked of petitioners resulted from the electronic surveillance.

The legal contentions are also narrowly drawn. Petitioners do not predicate their right to refuse to answer on the Fourth Amendment. This Court's decision in *United States* v. *Calandra*, —— U.S. ——, 38 L. ed.2d 561 (1974), has laid to rest the contention that the fruits of an unlawful search and seizure, not involving unlawful electronic surveillance, are inadmissible before a grand jury. However, contrary to the conclusion of the courts below, *Calandra* recognized and distinguished the statutory rights upon which petitioners rely,

"The dissent's reliance on *Gelbard* v. *United States*, 408 U.S. 41 (1972), is misplaced. There, the Court construed 18 U.S. § 2515, the evidentiary prohibition of Tit. III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 211, as amended, 18 U.S.C. §§ 2510-2520. It held that § 2515 could be invoked by a grand jury witness as a defense to a contempt charge brought for refusal to answer questions based on information obtained from the witness' communications alleged to have been unlawfully intercepted through wiretapping and electronic surveillance. The Court's holding rested exclusively on an interpretation of § 2515 and Tit. III, which represented a congressional effort to afford special safeguards against the unique problems posed by misuse of wiretapping and electronic surveillance. There was no indication, in either *Gelbard* or the legislative history of Tit. III, that § 2215 was regarded as a restatement of existing law. As Mr. Justice White noted in his concurring opinion in *Gelbard*, § 2515 'unquestionably works a change in the law with respect to the rights of grand jury witnesses. . . .'" —— U.S. ——, 38 L. ed.2d 575-576 n. 11. (Emphasis added.)

Also not in issue here is the right of a grand jury witness, who has *not* been held in contempt, to litigate the legality of the electronic surveillance which forms the basis for his questioning.[5]

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[5] Thus, governmental reliance on cases such as *Cali* v. *United States*, 464 F.2d 475 (1st Cir. 1972) is misplaced. It should, however, be noted that relief short of a full-blown motion to suppress has been accorded to pre-contempt grand jury witnesses. In *In re Vigorito*, 368 F. Supp. 613 (E.D.N.Y.) (Memorandum and Order of January 2, 1974, reconsideration denied January 14, 1974 and January 30, 1974), appeal argued and pending, No. 74-1322 (2d

In contrast to these questions, the issue presented by this petition is whether a grand jury witness, in contempt proceedings under 28 U.S.C. §1826(a), may defend on the ground that the question put to him violated 18 U.S.C. §2515 because it was the fruit of unlawful electronic surveillance. More accurately, since that precise question was answered affirmatively by this Court in *Gelbard* v. *United States, supra,* the issue this Court should now decide is the scope of the hearing which must be afforded a contemnor to litigate the legality of the challenged surveillance.

This Court has already decided the predicate issue in petitioners' favor.

Gelbard involved two sets of petitioners in different factual postures. Gelbard had been adjudged in civil contempt pursuant to 28 U.S.C. §1826 after refusing to answer questions which he contended were based on unlawful electronic surveillance. Gelbard had been informed that the surveillance was pursuant to court order. 408 U.S. at 44. He sought an opportunity to challenge the legality of the interceptions, which was denied him. The Ninth Circuit affirmed the order of civil contempt. This order was reversed by this Court.

Cir. 1974), subpoenaed individuals were compelled to give voice exemplars which the government intended to compare with electronic interceptions made pursuant to court order for the purpose of establishing the identity of the voices intercepted. The witnesses urged that the electronic surveillance was unlawful and moved to suppress its use before the grand jury and for return of their recorded conversations. Judge Dooling held that, while a full-blown motion to suppress was not proper at that stage of the proceeding, the government must disclose to counsel for the witnesses the orders and supporting papers authorizing the interceptions.

Egan had been adjudged in civil contempt pursuant to 28 U.S.C. §1826 for refusing to answer questions, after receiving transactional immunity, which she contended were predicated on unlawful electronic surveillance. The government refused to confirm or deny the existence of such electronic surveillance. The district court adjudged Egan in contempt. The Third Circuit reversed this order. This Court affirmed.

As phrased by this Court, the two main issues resolved in *Gelbard* were:

> "The question presented is whether grand jury witnesses, in proceedings under 28 U.S.C. §1826(a) are entitled to invoke this prohibition of §2515 as a *defense* to contempt charges brought against them for refusing to testify. . . . the Court of Appeals for the Ninth Circuit held that they are not entitled to do so . . . The Third Circuit, en banc, reached the contrary conclusion . . . We disagree with the Court of Appeals for the Ninth Circuit and agree with the Court of Appeals for the Third Circuit." 408 U.S. at 43-44.

The related issue was:

> ". . . whether a showing that interrogation would be based upon the illegal interception of the witness' communications constitutes a showing of 'just cause' that precludes a finding of a contempt." 408 U.S. at 45.

This question likewise was answered in the affirmative.

In simplest terms, this Court decided in *Gelbard* that 18 U.S.C. §2515 prohibited the compulsion of testimony

before a grand jury where the questions were predicated on unlawful electronic surveillance. Secondly, this Court decided that if the questioning was based upon unlawful electronic surveillance the witness had "just cause" to refuse to answer and could not be held in contempt pursuant to 28 U.S.C. §1826(a). Third, it was held that 18 U.S.C. §2518(10)(a) does not permit the making of a motion to suppress evidence before a grand jury so as to prevent indictment based on illegal electronic surveillance or to dismiss an indictment predicated on illegal electronic surveillance because grand juries are exempted from the forums enumerated in §2518. *"But it does not follow from the asserted omission of grand jury proceedings from the suppression provision that grand jury witnesses cannot invoke §2515 as a defense in contempt proceedings under 28 U.S.C. §1826(a)."* 408 U.S. at 59 (emphasis added). This Court thus held that the remedy is to move to suppress in court, in defense to the contempt proceedings. 408 U.S. at 60-61.

When confronted with these questions the court below advanced the novel position that if the electronic surveillance was conducted pursuant to court order the witness is without just cause to refuse to answer. 491 F.2d 1162 (12a). This position lacks any legal or logical foundation.

Section 2515 provides that evidence derived from intercepted communications may not be received before any grand jury "where the disclosure of that information would be in violation of this chapter." It is beyond question that disclosure is violative of the statute if electronic surveillance is unlawful either because it was not pursuant to court order or because the court order did not comply with the requirements of the act. As this Court's

recent decision in *United States* v. *Giordano,* —— U.S. ——, No. 72-1057, Oct. Term 1973 (May 13, 1974) demonstrates only too well, it would be ludicrous to suggest that §2515 bars admission of one type of unlawful evidence before the grand jury but not the other.

This view is supported by the holding in *Gelbard,* since Gelbard himself *had been informed that the electronic surveillance was pursuant to court order.* Thus, no purpose would have been served by vacating the contempt order as to Gelbard if the existence of a court order terminated his right to litigate the legality of the electronic surveillance.

The fallacy to be found in the contentions of the court below is, it is respectfully submitted, amply answered by this Court's recent decision in *United States* v. *Giordano, supra.* There, this Court held that court orders authorizing electronic surveillance under Title III of the Omnibus Crime Control and Safe Streets Act were invalid because they had been procured upon the basis of Department of Justice application authorizations which were not executed in conformity with the provisions of 18 U.S.C. §2516(1). In light of *Giordano,* could it legitimately be contended, e.g., that the "Lindenbaum orders" were attackable only by a defendant once an indictment for a substantive offense had been returned against him and not attackable by a contemnor whose grand jury subpoena and subsequently compelled testimony had been obtained by the same invalid orders? It is too late in the day to assert that §2515 bars admission of one form of unlawful eavesdropping but not another.

Contrary to the opinion of the courts below, the legislative history of §2515 reveals that Congress intended the section to protect against invasion of privacy from unlawful electronic surveillance *regardless* of the nature of the illegality:

> "*Section 2515 of the new chapter imposes an evidentiary sanction to compel compliance with the other prohibitions of the chapter.* It provides that intercepted wire or oral communications or evidence derived therefrom may not be received in evidence in any proceeding before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision of a State, where the disclosure of that information would be in violation of this chapter. The provision must, of course, be read in light of section 2518(10)(a) discussed below, which defines the class entitled to make a motion to suppress. It largely reflects existing law. *It applies to suppress evidence directly* (*Nardone* v. *United States*, 58 S. Ct. 275, 302 U.S. 379 (1937) *or indirectly obtained in violation of the chapter.* (*Nardone* v. *United States*, 60 S. Ct. 266, 308 U.S. 338 (1939).) There is, however, no intention to change the attenuation rule. See *Nardone* v. *United States*, 127 F.2d 521 (2d Cir.), certiorari denied, 62 S. Ct. 1296, 316 U.S. 698 (1942); *Wong Sun* v. *United States*, 83 S. Ct. 407, 371 U.S. 471 (1963). Nor generally to press the scope of the suppression rule beyond present search and seizure law. See *Walder* v. *United States*, 74 S. Ct. 354, 347 U.S. 62 (1954). But it does apply across the board in both Federal and State proceedings. Compare *Schwartz* v.

> *Texas*, 73 S. Ct. 232, 344 U.S. 199 (1952). *And is not limited to criminal proceedings. Such a suppression rule is necessary and proper to protect privacy.* Compare, *Adams* v. *Maryland*, 74 S. Ct. 442, 347 U.S. 179 (1954); *Mapp* v. *Ohio*, 81 S. Ct. 1684, 367 U.S. 643 (1961). The provision thus forms an integral part of the system of limitations designed to protect privacy. Along with the criminal and civil remedies, it should serve to guarantee that the standards of the new chapter will sharply curtail the unlawful intercession of wire and oral communications." (Emphasis added.) 1968 U.S. Code Cong. & Admin. News, at 2184-2185.

It is unthinkable in light of the broad sweep of the statute's language and the equally broad explanation of statutory purpose in the legislative history, that Congress did not intend the exclusionary rule of §2515 to apply where interceptions were pursuant to court order.

The legislative history of §2518(10)(a)[6] also supports the view that the defense afforded by §2515 entails a full motion to suppress:

> "Paragraph (10)(a) provides that any aggrieved persons, as defined in section 2510(11), discussed above, in any trial hearing or other proceeding in or before any court department, officer, agency, regulating body or other authority of the United States, a State, or a political subdivision of a State may make a motion to

[6] Section 2518(10)(a) provides the procedural vehicle for the defense contemplated by §2515 when a grand jury witness is held in contempt for refusing to answer questions predicated on unlawful electronic surveillance. As noted in *Gelbard*, the two sections must be read together. Thus, the scope of the motion to suppress available under §2515 is that embodied in §2518(10)(a).

suppress the contents of any intercepted wire or oral communication or evidence derived therefrom. [This provision must be read in connection with sections 2515 and 2517, discussed above, which it limits. It provides the remedy for the right created by section 2515.] Because no person is a party as such to a grand jury proceeding, the provision does not envision the making of a motion to suppress in the context of such a proceeding itself. Normally, there is no limitation on the character of evidence that may be presented to a grand jury, which is enforcible by an individual. (*Blue* v. *United States,* 86 S. Ct. 1416, 384 U.S. 251 (1965).) There is no intent to change this general rule. It is the intent of the provision only that when a motion to suppress is granted *in another context,* its scope may include use in a future grand jury proceeding. Nor is there any intent to grant jurisdiction to Federal courts over the Congress itself. See *Hearst* v. *Black,* 66 App. D.C. 313, 87 F.2d 68 (1936). Otherwise, the scope of the provision is intended to be comprehensive. [The motion may be made on the ground that: (i) the communication was unlawfully intercepted, (ii) the order of authorization or approval is insufficient on its face, or (iii) the interception was not made in conformity with the order. The motion must be made before the trial, *hearing or proceeding* unless there was no opportunity to make the motion or the person was not aware of the grounds of the motion, for example, when no notice was given under paragraph (9), discussed above.] Care must be exercised to avoid having a defendant defeat the right of appeal under paragraph (b), discussed below, by waiting until trial. (*Giacona* v. *United States,* 257 F. 450 (5th), *certiorari denied,* 79

> S. Ct. 113, 358 U.S. 873 (1958).) Upon the filing of such a motion to suppress, the court may make available to the person or his counsel such portions of the intercepted communications or evidence derived therefrom as the court determines to be in the interest of justice. This provision explicitly recognizes the propriety of limiting access to intercepted communications or evidence derived therefrom according to the exigencies of the situation. The motion to suppress envisioned by this paragraph should not be turned into a bill of discovery by the defendant in order that he may learn everything in the confidential files of the law enforcement agency. Nor should the privacy of other people be unduly invaded in the process of litigating the propriety of the interception of an aggrieved person's communications. (Emphasis added.) 1968 U.S. Code Cong. & Admin. News, at 2195.

The court below reasoned that a full motion to suppress would interrupt the smooth functioning of the grand jury. 491 F.2d 1160-1161, n. 3 (8a-9a). This objection lacks merit. Once a witness has been held in contempt he is removed from the stream of the grand jury's proceedings. Absent the opportunity to demonstrate his "just cause" the witness may remain in custody without further contact with the grand jury. Congress, however, by creating special legislation more protective of the rights of privacy than the Fourth Amendment, which privileges the grand jury witness to refuse to answer questions predicated on uulawful electronic surveillance, insures that the witness without a legitimate claim will more likely be returned to the stream of the grand jury process than the witness who, under the

theory of the courts below may be left to languish in jail during the life of the grand jury.

The essence of this Court's opinion in *Gelbard* is that, in defense to a contempt proceeding a witness may demonstrate that he had "just cause" to refuse to answer because the questions were predicated on unlawful electronic surveillance, in violation of the clear mandate of 18 U.S.C. §2515, whether or not such surveillance was court ordered. Petitioners were entitled to litigate the legality of the surveillance to which they were subjected and, absent an opportunity to do so, their refusals to answer do not constitute contempt within the meaning of 18 U.S.C. §1826(a).

II.

Certiorari should be granted because a conflict between the Circuits exists regarding the applicability of Fed. R. Crim. P. 42(b) to an 18 U.S.C. §1826(a) contempt proceeding.

These cases also raise the issue of whether proceedings under 28 U.S.C. §1826(a) are "summary" or whether the procedures embodied in Fed. R. Crim. P. 42(b) should apply.

It is clear that Fed. R. Crim. P. 42(b) applies where a witness is held in criminal contempt for an orderly refusal to testify, either at a trial or before a grand jury. *United States* v. *Wilson,* 488 F.2d 1231 (2d Cir. 1973); *United States* v. *Marra,* 482 F.2d 1196 (2d Cir. 1973); *United States* v. *Handler,* 476 F.2d 709 (2d Cir. 1973). The hallmark of such a contempt is a sentence, the purpose of which is punitive rather than coercive, and cannot be purged. *Shillitani* v. *United States,* 384 U.S. 364 (1966).

Section 1826(a) authorizes "summary" commitments for refusals to testify before a court or grand jury and the imposition of coercive sentences. Thus, proceedings under §1826(a) are in the nature of "civil" contempt, at least for the purposes of sentencing.

However, contempt proceedings are particularly difficult to characterize as wholly civil or wholly criminal for all relevant purposes.

In *United States* v. *Alter*, 482 F.2d 1016 (9th Cir. 1973), an immunized grand jury witness refused to answer questions on the ground that the questions derived from unlawful electronic surveillance of him or his attorney. The government represented that there was no surveillance of the witness but refused to respond to the inquiry about the attorney. Upon the witness' continued refusal to answer he was cited for contempt pursuant to §1826(a). Forty-five minutes later a hearing was held to determine whether the witness should be held in contempt. The Ninth Circuit held that this procedure was insufficient to permit the witness adequately to prepare a defense. It reasoned that, for purposes of the procedures to be followed, such a contempt was the same as a criminal contempt so that the provisions of Rule 42(b) were applicable:

> "At the threshold of *Gelbard*, the Court said that section 1826(a) was 'intended to codify the existing practice of the federal courts,' citing portions of its legislative history and *Shillitani* (408 U.S. at 42-43 n. 1, 92 S. Ct. at 2358). The unmistakable import of these observations is that section 1826(a) has no effect upon the procedural ground rules the Court had laid in cases anteceding that the enactment of the statute-rules

> which expressly forbade summary proceedings for such contempts. . . . we conclude that a proceeding in contempt to compel a federal grand jury witness to testify is civil enough to foreclose his claim that he has a constitutional right to trial by jury (*Shillitani*) and criminal enough to require the application of Rule 42(b) (*Harris*), a conclusion we reached less elaborately in United States v. Dinsio (9th Cir. 1972), 468 F.2d 1392. It follows, therefore, that Alter was entitled to notice prescribed by Rule 42(b) and to a reasonable time to prepare his defense, i.e. to show 'just cause' for refusing to respond." 482 F.2d at 1022-1023.

In the instant cases, the petitioners were held in contempt, denied bail and seized by the marshals immediately upon their refusals to testify.[7] Counsel objected to these procedures, requesting a Rule 42(b) hearing (46a).

The only justification for "summary" contempt proceedings is where the contempt is committed in the actual presence of the court and immediate action is necessary to preserve the integrity of the court.[8] *Orderly* refusals to testify, whether before a court or grand jury, whether the intended punishment be civil or criminal in nature, should never be punished summarily. Compare, *Mayberry* v. *Pennsylvania*, 400 U.S. 455 (1971). See also, *Theriault* v. *United*

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[7] Although Persico's applications for bail were denied by the district court, the Second Circuit and this Court, Judge Dooling denied Langella bail upon the erroneous assumption that a §1826 (a) contempt was not bailable. See, 28 U.S.C. §1826(b).

[8] The conditions precedent to a finding of "summary" contempt as set forth in Fed. R. Crim. P. 42(a). See also, *United States* v. *Seale*, 461 F.2d 345, 366-367 (7th Cir. 1972).

States, 481 F.2d 1193 (5th Cir. 1973). The basic components of due process, notice and an opportunity to be heard, as the Ninth Circuit has held, must be afforded before liberty may be forfeited under such circumstances.

Since the conflict between the Ninth and Second Circuits as to the applicability of Fed. R. Crim. P. 42 procedures to §1826(a) contempts will cause disparate treatment among contemnors, certiorari should be granted to resolve this conflict.

III.

The Court below disregarded the legal standard enunciated in *Stevens* v. *Marks*, 383 U.S. 234 (1966) when it reviewed petitioner Persico's claim that the description of the immunity given to him by government counsel was fatally misleading.

18 U.S.C. §6002 (Pub. L. 91-452, Title III, §201(a), 84 Stat. 927), provides that the immunity conferred under that section prohibits the "use" of that "testimony or other information compelled under the order [of immunity] or any information directly or indirectly derived from such testimony or other information," from being "used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." *Id.*

While §6002 confers "use" as opposed to "transactional" immunity, nevertheless,

> "The statute provides a sweeping proscription of any use, direct or indirect, of the compelled testimony and any information derived therefrom . . . it imposes on

> the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." *Kastigar* v. *United States*, 406 U.S. 441, 460-61 (1972).

In *Kastigar*, this court upheld the constitutionality of §6002 in the face of a claim that the "use" immunity granted thereunder was not co-extensive with the privilege against self-incrimination, the petitioner there claiming that the Fifth Amendment required "transactional" immunity from *any* prosecution related to the scope of the investigation. In rejecting this claim, this Court, noted that prosecution by a state sovereign was impeded only to the same extent as the Federal government's use or derivative use of the testimony. *Kastigar, supra*, at 406 U.S. 459 n. 49, citing *Gardner* v. *Broderick*, 392 U.S. 273, 276 (1968). See also, *Zicarelli* v. *Investigation Commission*, 406 U.S. 472 (1972).

During the course of the grand jury proceedings in this case, government counsel explained to petitioner Persico the protection afforded to him by the grant of immunity[9] and its scope:

> "This order states that it will give you immunity. By this we mean, sir, you have [use] immunity. By that I mean everything you say cannot be used against you in a Court of law" (27a).

Subsequently, at a later time during the proceedings, Persico requested that the scope of the protection afforded him be explained:

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[9] Copies of the immunity orders for the witnesses Persico and Langella are set forth in the Appendix *infra*, at 19a and 20a.

"The Witness: About this immunity, how does this affect me in any prosecution with federal or state about questions asked here?

Mr. Del Grosso: Any testimony that you give here today cannot be used against you in any federal or state Court.

The Witness: Is that with the Internal Revenue and everything?

Mr. Del Grosso: That's right across the board. Anything you say today cannot be used against you. If the government should show independent evidence; that is, evidence independent of your testimony that can be used, however, anything you say cannot be used against you at any subsequent date that you may come before this grand jury. Do you understand that?

The Witness: Yes" (31a-32a).

Despite petitioner's (a layman) statement that he understood what the prosecutor had said, the description of the scope of the protection afforded was wholly deficient.

The Court below did not entirely disagree. Rather, after characterizing the explanation as neither "the epitome of either precision or lucidity," 491 F.2d at 1163 (13a), it nevertheless assumed that petitioner was "probably" sufficiently apprised of the extent of the immunity he had been granted because "experienced and competent counsel" had challenged the insufficiency of the government's explanation before the district court. *Id.* (13a). From this it inferred that petitioner was not misled. This is hardly the point, as this Court recognized in *Stevens* v. *Marks*, 383 U.S. 234 (1966). See also, *Raley* v. *Ohio*, 360 U.S. 423 (1959); *Bursey* v. *United States*, 466 F.2d 1059, 1081

(9th Cir. 1972); *People* v. *Masiello,* 28 N.Y.2d 287 (1971); *People* v. *Tramunti,* 29 N.Y.2d 28 (1971).

First, the prosecutor never explained that the grant of immunity protected Persico not only from prosecution based upon the testimony uttered itself, but also from the utilization of the fruits of that testimony, its exploitation and indirect use, in conformity with the "sweeping proscription" actually afforded by §6002. *Kastigar, supra; Counselman* v. *Hitchcock,* 142 U.S. 547 (1892).

Second, the prosecutor inaccurately informed the witness that it was merely his testimony that a state sovereign was prohibited from using against him, rather than fully explaining that the protection afforded him by §6002 from state prosecution was only as broad as the "use" prohibition imposed upon the federal government.

Thus, the prosecutor failed to fully inform the petitioner (1) as to the breadth of his protection from federal prosecution, and (2) as to the limits upon his protection from state prosecution. Compare, *Murphy* v. *Waterfront Commission,* 378 U.S. 52 (1964), in which the petitioners had been granted transactional immunity.

Having thus misinformed petitioner as to the scope of the immunity conferred, this Court's decision in *Stevens* v. *Marks, supra,* required the court below to vacate the contempt citation against Persico regardless of whether his counsel may or may not have been misled.

In *Stevens,* a member of the New York City Police Department who had been subpoenaed to appear before a state grand jury, signed a waiver of the privilege against self-incrimination and of immunity from prosecution in order to avoid removal from public office. After consulting

with counsel, Stevens attempted to withdraw his waiver in order to contest its validity and then refused to answer questions before the grand jury, asserting his privilege against self-incrimination. He was adjudged to be in contempt. This Court, per Mr. Justice Douglas, reversed the contempt convictions on the grounds, *inter alia,* that the officer had erroneously been led to believe that no immunity was available. The State of New York countered by contending that what Stevens believed was immaterial since he had obtained immunity by operation of law merely by testifying. 383 U.S. at 244. The State further suggested that the case be remanded to the New York courts for a hearing as to whether Stevens was misled by the District Attorney's statements. In declining to remand, this Court held:

> "A witness has, we think, a constitutional right to stand on the privilege against self-incrimination until it has been fairly demonstrated to him that an immunity, as broad in scope as the privilege it replaces is available and applicable to him . . .
>
> "The suggestion that we should remand the case to the New York courts for a finding of whether or not petitioner was misled is, we think, wide of the mark. A State must affirmatively demonstrate to the witness that a valid immunity from prosecution is his before it may hold him in contempt for refusing to answer questions that would otherwise be incriminating. Whether the State has met its burden must be measured at the time of the alleged contempt." 383 U.S. at 246 and n. 11.

This Court thus ruled that the petitioner's state of mind was irrelevant so long as at the time of the alleged con-

tempt a deficient explanation of immunity had, as here, been given by the prosecutor.

The court below totally ignored the standard of review set forth in *Stevens*, although *Stevens* had been cited to it, and, instead interposed its own subjective estimate, based on Persico's counsel's "competency and experience," that Persico was "probably" not misled.

Certiorari should be granted and the decision below reversed so as to make clear the continuing validity of the *Stevens* rule that when immunity is conferred it must be described with "unmistakable clarity." *Bursey, supra.*

CONCLUSION

For all of the foregoing reasons, certiorari should be granted and the judgments below reversed.

Respectfully submitted,

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APPENDIX

Opinion of the Court of Appeals

(491 F.2d 1156)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Argued Feb. 5, 1974. Decided Feb. 19, 1974.

No. 867, Docket 74-1101

In the Matter of

ALPHONSE PERSICO,

Appellant.

The United States District Court for the Eastern District of New York, Orrin G. Judd, *J.*, found grand jury witness in contempt, and witness appealed. The Court of Appeals, Waterman, Circuit Judge, held that witness who had been granted "derivative use" immunity was not entitled to hearing to ascertain whether questions posed were product of unlawful electronic surveillance and could refuse to answer questions only where there was absence of necessary court order for electronic surveillance or government conceded that surveillance was not conducted according to law.

Affirmed.

Nancy Rosner, New York City, for appellant.

Robert G. DelGrosso, Denis E. Dillon, Attys., Dept. of Justice; Edward J. Boyd V, U.S. Atty., E.D.N.Y., for U.S.

Before WATERMAN and MULLIGAN, *Circuit Judges*, and BRYAN, *District Judge*.*

WATERMAN, *Circuit Judge*:

This is an appeal from an adjudication of civil contempt pursuant to 28 U.S.C. §1826(a) for refusal to answer a question propounded by a grand jury. Appellant refused to answer certain earlier questions on constitutional grounds and was granted "use" and "derivative use" immunity. Then, after answering a few questions, he objected to a particular question and, relying on Gelbard v. United States, 408 U.S. 41, 92 S. Ct. 2357, 33 L. ed.2d 179 (1972), maintained that the question was derived from electronic surveillance which he claimed was presumptively illegal. The Government eventually acknowledged that the line of questioning the grand jury had been pursuing was a product of the electronic interception of oral communications but strenuously affirmed that the surveillance was conducted under proper court orders and was in complete conformity with the requirements of federal law under 18 U.S.C. §§2510-2520. We are thus called upon to decide whether appellant, in defending the contempt action brought against him when he refused, though granted "use" and "derivative use" immunity, to answer before a Grand Jury a question derived from electronic surveillance conducted under court order, has a right in a civil contempt proceeding to litigate the legality of that surveillance. We hold that he does not.

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* Of the United States District Court for the Southern District of New York, sitting by designation.

The facts in this case are not complex. On January 23, 1974, appellant was called as a witness before a federal grand jury "investigating racketeering influence in legitimate business." Relying on his Fifth Amendment privilege, he initially refused to answer any questions concerning his employment. Thereupon, pursuant to 18 U.S.C. §§ 6002 and 6003 Persico was granted "use" and "derivative use" immunity. At this point appellant continued to be recalcitrant and began to object to questioning with reference to his employment on the ground that the questions were the product of illegal electronic surveillance. The Government requested that Judge Orrin Judd issue a contempt citation for refusal to testify. Judge Judd regarded the request as premature and, not perceiving any connection between the question and the surveillance, ordered Persico to testify under threat of contempt. Persico then answered some questions regarding his lawful employment but refused to respond to a question regarding "any other occupation." This refusal was again based on appellant's contention that the question was a "fruit" of illegal electronic surveillance. The Government, conceding that this question was derived from electronic surveillance, argued that the surveillance, which was conducted pursuant to three court orders, was entirely legal. Judge Judd inspected the court orders in camera, found them to be proper, refused to grant appellant's motion that a suppression hearing be held to test the legality of the surveillance, and renewed his order to testify.

Persico returned to the grand jury where he acknowledged that he did indeed have other business interests, more particularly, an illegal gambling business involving "horses, sports and numbers." His cooperation ceased, however,

when he was asked to identify the individuals who worked for him in these surreptitious enterprises.[1] He again

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[1] The immediate questioning which led up to the contempt order followed an admission by Persico that he was the sole operator of an illegal gambling business:

Q. (Mr. DelGrosso) Where is your base of operations today? A. Before I answer that, can I speak to my counsel, before I answer that question?

Q. Sure, you may.

At this time Mr. Persico left the Grand Jury Room and reentered after consulting with his counsel.

Mr. DelGrosso: Read the question back, reporter.

At this time the question was read back.

A. I—you take them off the street corner. People take bets, you know. So there is really no place, in the house maybe, they'll take it in one day.

Q. Are you the boss of this organization? A. Yes.

Q. Do you have people working for you? A. Yes.

Q. You do? A. Yes.

Q. Who are these people? A. I guess we have to go back to the Judge again.

Mr. DelGrosso: Okay. We'll go upstairs to the Judge.

Whereupon, Mr. DelGrosso and Mr. Persico left the room and reentered the room without going up to the Judge.

Q. The question was, who were the individuals who worked for you? A. Can I read this into the record?

Q. Yes, you may. A. You already told me that my house was bugged last spring.

Mr. DelGrosso: Yes.

A. Now you're asking me who works for my gambling business. You know the answer to that question as a result of electronic surveillance of my home. As a result of electronic surveillance, I feel you're only asking me, for me to refuse to answer, because you know this information from the electronic surveillance in my home.

I still maintain that the electronic surveillance on my home was unlawful and should not be permitted and you should not be permitted to ask me these questions.

Q. Is that it? A. Yes.

Q. I again ask you, sir, who are the individuals that work for you, and are you refusing to answer that question? A. Yes.

grounded his objections, inter alia, on the alleged illegality of the electronic surveillance which was the source of the question, saying: "You know the answer to that question as a result of electronic surveillance of my home." Upon this refusal to respond, Judge Judd held Persico to be in contempt and sentenced him to 60 days in jail, subject, however, to immediate release should appellant decide to answer the question. Persico then reinstituted his motion to suppress and claimed the right to examine the court orders and accompanying documents under which the three wiretaps had been authorized. This motion was denied. A concurrent motion for bail pending appeal was likewise unsuccessful. On January 28, 1974, we also denied Persico's

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Q. I ask the Grand Jury foreman to order the witness to answer that question.

The Foreman: You are hereby ordered to answer the questions under the terms of the power of the grant of immunity and the power of the Grand Jury.

A. Immunity pertains to only me. Is that so?
Q. That's so. A. It does not pertain to anybody else?

Mr. DelGrosso: No, it does not.

Whereupon Mr. DelGrosso and Mr. Persico then left the Grand Jury chamber and reentered.

Q. The question was, who are the individuals involved in the gambling operation, and do you refuse to answer? You were ordered to do so. You were ordered to do so by the Grand Jury foreman. Is that not correct? A. Yes.
Q. Are you going to give us those names, sir? A. Before answering this question, I would like to know whether or not, if I am correct, that you already have this information as a result of illegal bugs in my home?

Mr. DelGrosso: I need not answer any such question. You have been ordered to give those names. If you will give those names, you will not be brought up before the judge. If you will not answer, we will have to go to the judge.
You are going to have to go to the judge, sir? Is that it, sir?

A. Yes, let's go to the judge.

separate application to us for bail pending appeal, but, a notice of appeal on the merits having been filed on January 25, we ordered that the appeal be speedily brought on, and it was argued on February 5.

Chapter 119 of Title 18 of the United States Code, entitled "Wire Interception and Interception of Oral Communications," 18 U.S.C. §§2510-2520, represents an assiduous congressional effort to balance the individual's right to privacy against the Government's legitimate interest in gathering information necessary for the prosecution of crimes.[2] Integral to the statutory scheme are elaborate precautions taken to insure that electronic surveillance is not used unnecessarily and that when it must be used its duration is narrowly circumscribed. To maximize compliance with the provisions of Chapter 119 by investigative authorities who desire to employ wiretaps and other electronic devices the chapter contains its own "exclusionary rule," 18 U.S.C. §2515, which provides:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

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[2] The striking of this balance is achieved primarily through the statutory provisions requiring the Government to obtain a court order authorizing the electronic interception. See 18 U.S.C. §§2511(1)(a), 2516(1). As might be expected, the statute also contains some express exceptions to this general mandate. See, e.g., 18 U.S.C. §§2511(3), 2518(7).

The apparently ample breadth of this proscription has been confirmed by Gelbard v. United States, *supra*. In that case the Supreme Court held that in contempt proceedings instituted under 28 U.S.C. §1826(a) for failure to obey a court order to answer a question before a grand jury, the witness refusing to give the testimony may avail himself of the defense that the question propounded to him violates §2515 because it was derived from electronic surveillance conducted in violation of Chapter 119. Appellant believes that *Gelbard* controls our adjudication of the facts before us and that before answering questions he believes are the product of electronic interception he is entitled to have a hearing as to whether the interception was in violation of Chapter 119. Insofar as *Gelbard* permits a grand jury witness to refuse to answer a question derived from concededly unlawful electronic surveillance and then successfully to defend a contempt proceeding for so refusing, we agree with appellant. *Gelbard* does indeed govern that narrow situation. The holding there, however, was expressly predicated on an assumption by the Court "that the communications were not intercepted in accordance with the specified procedures and thus that the witnesses' potential testimony would be 'disclosure' in violation of Title III. See 18 U.S.C. §§2511(1), 2517(3)." The Court left undecided the issue of "whether [witnesses] may refuse to answer questions if the interceptions of their conversations were pursuant to court order." Id. at 61 n. 22, 92 S. Ct. at 2368. Here appellant urges that the mere existence of a court order should not preclude the witness from fully litigating in the contempt proceeding the lawfulness of the surveillance. We disagree.

Although the *Gelbard* footnote technically left "undecided" the scope of any inquiry designed to determine the legality of a court-ordered surveillance, a careful exam-

ination of that decision is revealing. Mr. Justice White in a concurring opinion supplied the decisive vote for the majority's reversal of the Ninth Circuit's holding in *Gelbard*, 443 F.2d 837 (1971). In that opinion he intimated, 408 U.S. at 70, 92 S. Ct. at 2372, 33 L. Ed.2d 179, that when, during grand jury proceedings, the Government *does* produce a court order the traditional notion that the functioning of the grand jury system should not be impeded or interrupted could prevail at that time over the witness's interest in exploring in depth the validity of the surveillance.

> Where the Government produces a court order for the interception, however, and the witness nevertheless demands a full-blown suppression hearing to determine the legality of the order, there may be room for striking a different accommodation between the due functioning of the grand jury system and the federal wiretap statute. Suppression hearings in these circumstances would result in protracted interruption of grand jury proceedings. At the same time, prosecutors and other officers who have been granted and relied on a court order for the interception would be subject to no liability under the statute, whether the order is valid or not; and, in any event, the deterrent value of excluding the evidence will be marginal at best.[3]

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[3] The Supreme Court's continuing concern over potential obstructions to the expeditious performance of the grand jury's function is illustrated by its recent decision in United States v. Calandra, —— U.S. ——, 94 S. Ct. 613, 38 L. ed.2d 561 (1974), in which the Court held that a grand jury witness cannot refuse to answer questions on the ground that they are the product of unlawful searches and seizures. The Court, echoing the concerns expressed in Mr. Justice White's concurring opinion in Gelbard v. United States, supra, there stated:

> Permitting witnesses to invoke the exclusionary rule before a grand jury would precipitate adjudication of issues

Congressional concern over disruption of smooth and efficient operation of the grand jury system is found in the legislative history of Chapter 119, also. Senate Report No. 1097, printed in 1968 U.S. Code Cong. & Admin. News p. 2112, appears to controvert Persico's contention that in defending the contempt proceedings resulting from his refusal to answer a question before the grand jury he is entitled to a suppression hearing. Though the legislative history recognizes that illegally obtained wiretap evidence, or the fruits thereof, must be excluded from any proceedings before a grand jury, the history further discloses that the exclusionary rule "must, of course, be read in light of section 2518(10)(a) discussed below, which defines the class entitled to make a motion to suppress." Senate Report No. 1097, *supra* U.S. Code Cong. & Admin. News 1968, at p. 2185. Most crucial to our task, therefore, is the congressional understanding of the effect of § 2518(10)(a) on the grand jury process:

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hitherto reserved for the trial on the merits and would delay and disrupt grand jury proceedings. Suppression hearings would halt the orderly progress of an investigation and might necessitate extended litigation of issues only tangentially related to the grand jury's primary objective. The probable result would be "protracted interruption of grand jury proceedings," Gelbard v. United States, 408 U.S. 41, 70 [92 S. Ct. 2357, 33 L. ed.2d 179] (1972) (White, J., concurring), effectively transforming them into preliminary trials on the merits. In some cases the delay might be fatal to the enforcement of the criminal law. Just last Term we reaffirmed our disinclination to allow litigious interference with grand jury proceedings:

"Any holding that would saddle the grand jury with mini-trials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal law." United States v. Dionisio, 410 U.S. 1, 17 [93 S. Ct. 764, 35 L. ed.2d 67] (1973).

94 S. Ct. at 620-621 (footnotes omitted; citations partially omitted).

"Paragraph (10)(a) provides that any aggrieved persons, as defined in section 2510(11), discussed above, in any trial hearing or other proceeding in or before any court department, officer, agency, regulating body or other authority of the United States, a State, or a political subdivision of a State may make a motion to suppress the contents of any intercepted wire or oral communication or evidence derived therefrom. This provision must be read in connection with sections 2515 and 2517, discussed above, which it limits. It provides the remedy for the right created by section 2515. *Because no person is a party as such to a grand jury proceeding, the provision does not envision the making of a motion to suppress in the context of such a proceeding itself.* Normally, there is no limitation on the character of evidence that may be presented to a grand jury, which is enforcible by an individual. (Blue v. United States [United States v. Blue], 86 S. Ct. 1416, 384 U.S. 251 [16 L. Ed.2d 510] (1965).) There is no intent to change this general rule. It is the intent of the provision only that when a motion to suppress is granted *in another context,* its scope may include use in a *future* grand jury proceeding. . . ." Senate Report No. 1097, *supra* U.S. Code Cong. & Admin. News 1968, at p. 2195. (Emphasis supplied).

As noted, though Congress prescribed that illegal wiretap evidence must be excluded from all grand jury proceedings, hearings to suppress evidence were not to be permitted during such proceedings. These seemingly inconsistent policy determinations can be reconciled only by interpreting the statute as requiring exclusion only when it is

clear that a suppression hearing is unnecessary, as when the Government concedes that the electronic surveillance was unlawful or when the invalidity of the surveillance is patent, such as, for example, when no prior court order was obtained, or when the unlawfulness of the Government's surveillance has been established in a prior judicial proceeding. In these situations both statutory policies—the exclusion of illegally acquired evidence and the maintenance of unimpeded grand jury proceedings—are served. But where illegality is claimed and, if established, can be established only by way of a plenary suppression hearing, one important aim of the legislation would be frustrated.

Appellant, however, referring also to the language of the legislative history quoted above, would have us find that the contempt proceeding here is a proceeding in "another context" and therefore the general proscription against hearings upon motions to suppress in grand jury proceedings does not prevent motions to suppress and hearings thereon in contempt proceedings arising out of a witness's refusal to answer a grand jury's question. While appellant's argument is a superficially plausible one, his reasoning in support of the argument is unrealistic. The contempt mechanism employed here to coerce testimony is so intimately connected with the grand jury proceedings in which the testimony is desired as to be really a part of those proceedings. Obviously, any expansion of the breadth of inquiry permissible in a contemporaneous contempt proceeding initiated because of the recalcitrance of a grand jury witness necessarily inhibits the smooth functioning and efficient operation of that grand jury.

Moreover, Congress could not have intended that a *contemporaneous* civil contempt proceeding such as the one

involved here—a proceeding whose only purpose is to invite a recalcitrant witness to cooperate with the grand jury —is a proceeding "in another context" rather than in the context of the grand jury's proceedings. That the congressional intent was so limited is demonstrated by the language of the Senate Report that the scope of a suppression order granted "in another context" may extend to a "future grand jury proceeding," that is, may extend only to a grand jury proceeding which clearly postdates the proceeding "in another context." Therefore the term "another context" could not have been intended to include a hearing on a contempt citation contemporaneous with the grand jury proceeding.

We hold that in contempt proceedings initiated when a witness who has been granted "derivative use" immunity refuses to answer questions propounded by a grand jury because he claims he is entitled to a hearing to ascertain whether the questions posed are the product of unlawful electronic surveillance the witness is not entitled to a plenary suppression hearing to test the legality of that surveillance. We hold that the refusal would be permissible only if there is an absence of a necessary court order or if there is a concession from the Government that the surveillance was not in conformity with statutory requirements or if there is a *prior* judicial adjudication that the surveillance was unlawful. Here there were three court orders. Inasmuch as Judge Judd conducted an in camera inspection to ascertain whether they complied with the statute and found that they did comply, Persico received all that he was entitled to receive. He therefore has no basis for complaint that his motions for suppression hearings were denied.

Persico also asserts that the procedure provided for by Rule 42 of the Federal Rules of Criminal Procedure establishes the procedure which should have been, but was not, followed in this case. This contention is without merit. Rule 42 applies only in those contempt proceedings in which the purpose is punitive, i.e., in criminal contempt proceedings. Here Persico has the power to secure his own release from confinement by agreeing to answer the question he refused to answer. Thus, the purpose of holding Persico in contempt was to coerce him to answer the grand jury's question and was not to punish him for reprehensible conduct. Persico was only a recalcitrant witness, his contempt was manifestly civil in character, and, as such, the summary procedure and the limitation of permissible confinement set forth in 28 U.S.C. §1826 was, and is, applicable here.

As his final point, appellant claims that the immunity conferred upon him, *as explained to him by the Government,* was not co-extensive with his privilege against self-incrimination and therefore he could not be held in contempt for refusing to testify. The Government's explanation of the "use" and "derivative use" immunity conferred on Persico under 18 U.S.C. §6002 was not the epitome of either precision or lucidity. Nevertheless, it probably sufficiently apprised Persico of the extent of the immunity he had been granted; at the very least its extent was implicit in the prosecutor's remark to Persico that he could be prosecuted for crimes involved in matters about which he was testifying "if the government should show independent evidence."[4] In any event, we are not persuaded that appellant was misled inasmuch as his experienced and

[4] See transcript of January 23, 1974 proceedings, p. 20.

competent counsel must have been fully aware of the extent of §6002 immunity. For instance, she acknowledges that she previously challenged the alleged technical insufficiency of the Government's explanation of the scope of the immunity, presumably on the ground that that explanation appeared to attribute to §6002 immunity a narrowness incompatible with both the plain meaning of and the Supreme Court's understanding of the section, see Kastigar v. United States, 406 U.S. 441, 453, 92 S. Ct. 1653, 32 L. Ed.2d 212 (1972), cited in her brief on appeal. We cannot believe that she ever understood that the Government intended to confer anything less than the full "use" and "derivative use" immunity "explicitly" conferred by §6002. See Kastigar v. United States, *supra* at 453, 92 S. Ct. 1653. She objected to the explanations given to Persico; but whatever semantic deficiencies, if any, there may have been in those explanations they did not prevent her from outlining to her client the extent of the immunity conferred upon him.

We affirm the order below adjudging appellant in civil contempt and directing his imprisonment.

Order Adjudging Petitioner Persico to Be in Contempt

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

In Re

ALPHONSE CARMINE PERSICO,

A Witness Before the Special September, 1972 Grand Jury.

On this 23rd day of January, 1974, this matter comes on for the attention of the Court upon the application of the United States of America, by and through Robert G. DelGrosso, Special Attorney, Department of Justice, for an order finding Alphonse Carmine Persico in direct contempt of court for his refusal to answer questions before the Special September, 1972 Grand Jury at Brooklyn, New York, on January 23, 1974. Alphone Carmine Persico was present in person and with his attorney, Nancy Rosner, New York, New York.

After hearing argument and being advised in the premises, the Court finds that Alphone Carmine Persico appeared before the Special September, 1972 Grand Jury sitting in Brooklyn, New York, on January 23, 1974; that Alphone Carmine Persico refused to answer questions propounded by said Grand Jury after having been granted immunity from prosecution under Title 18, United States Code, Section 6003 and ordered to answer questions before the said Grand Jury pursuant to the order of Honorable John R. Bartels, United States District Judge, Eastern

District of New York, of December 28, 1973 (upon the application of Edward J. Boyd V, United States Attorney, Eastern District of New York); that Alphonse Carmine Persico is in direct contempt of the order of this Court and should be committed to the custody of the United States Marshal.

IT IS ORDERED, ADJUDGED AND DECREED that Alphone Carmine Persico is in direct contempt of this Court for his failure to answer questions before the said Grand Jury and he is hereby committed to the custody of the United States Marshal for the Eastern District of New York, for sixty (60) days from the date of this Order, or until such time as he purges himself of this contempt.

IT IS SO ORDERED.

s/ .....

United States District Judge
Eastern District of New York

Order Adjudging Petitioner Langella to Be in Contempt

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

In Re

JERRY LANGELLA,

A Witness Before the Special September, 1972 Grand Jury.

On this 17th day of April, 1974, this matter comes on for the attention of the Court upon the application of the United States of America, by and through Robert G. DelGrosso, Special Attorney, Department of Justice, for an order finding Jerry Langella in direct contempt of court for his refusal to answer questions before the Special September, 1972 Grand Jury at Brooklyn, New York, on April 17, 1974. Jerry Langella was present in person and with his attorney, Gustave Newman, New York, New York.

After hearing argument and being advised in the premises, the Court finds that Jerry Langella appeared before the Special September, 1972 Grand Jury sitting in Brooklyn, New York, on April 17, 1974; that Jerry Langella refused to answer questions propounded by said Grand Jury after having been granted immunity from prosecution under Title 18, United States Code, Section 6003 and ordered to answer questions before the said Grand Jury pursuant to the order of Honorable John R. Bartels, United States District Judge, Eastern District of New York, of

March 20, 1974 (upon the application of Edward J. Boyd V, United States Attorney, Eastern District of New York); that Jerry Langella is in direct contempt of the order of this Court and should be committed to the custody of the United States Marshal.

IT IS ORDERED, ADJUDGED AND DECREED that Jerry Langella is in direct contempt of this Court for his failure to answer questions before the said Grand Jury and he is hereby committed to the custody of the United States Marshal for the Eastern District of New York, for the life of the Grand Jury from the date of this Order, or until such time as he purges himself of this contempt.

IT IS SO ORDERED.

s/ JOHN (Illegible)
United States District Judge
Eastern District of New York

Order of Immunity for Petitioner Persico

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

IN RE ALPHONSE CARMINE PERSICO

An application has been made to this Court by the United States Attorney (see application and affidavit annexed and marked "A" and "B" respectively) pursuant to his authorization by Henry E. Petersen, Assistant Attorney General for the Criminal Division of the United States Department of Justice (see copy of letter annexed and marked "C"), wherein the affiant has represented that in his judgment the testimony of Alphone Carmine Persico, before the Special United States Grand Jury in the Eastern District of New York, is necessary to the public interest. Pursuant to Title 18, United States Code, Sections 6002, 6003, it is hereby

ORDERED that Alphone Carmine Persico answer all questions directed to him by the aforesaid Grand Jury in the Eastern District of New York. It is further

ORDERED, that Alphone Carmine Persico shall not be excused from testifying or producing books, papers, or other evidence on the ground that testimony or evidence required of him may tend to incriminate him or subject him to a penalty of forfeiture.

s/ JOHN R. BARTELS
United States District Judge
Eastern District of New York

Dated: Brooklyn, New York
Dec. 28, 1973

Order of Immunity for Petitioner Langella

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

IN RE JERRY LANGELLA

An application has been made to this Court by the United States Attorney (see application and affidavit annexed and marked "A" and "B" respectively) pursuant to his authorization by Henry E. Petersen, Assistant Attorney General for the Criminal Division of the United States Department of Justice (see copy of letter annexed and marked "C"), wherein the affiant has represented that in his judgment the testimony of Jerry Langella, before the Special United States Grand Jury in the Eastern District of New York, is necessary to the public interest. Pursuant to the immunity provisions of Title 18, United States Code, Sections 6002, 6003, it is hereby

ORDERED that Jerry Langella answer all questions directed to him by the aforesaid Grand Jury in the Eastern District of New York. It is further

ORDERED, that Jerry Langella shall not be excused from testifying or producing books, papers, or other evidence on the ground that testimony or evidence required of him may tend to incriminate him or subject him to a penalty of forfeiture.

s/ J. R. BARTELS
United States District Judge
Eastern District of New York

Dated: Brooklyn, New York
March 20, 1974

Statement Read by Petitioner Langella to the Grand Jury

ELECTRONIC INTERCEPTION

I believe that my voice has been recorded and that this investigation and the questions that are to be asked of me are based upon information obtained as a result of the electronic interception of my conversations.

I, therefore, respectfully ask to be taken before a District Court Judge to be advised whether my conversations have been electronically intercepted and, if so, whether it is based upon a Court Order and Affidavit.

I respectfully request that a hearing be held pursuant to Title 18, United States Code, Section 2515 to determine the validity of the electronic interception and the validity of its execution.

Upon information and belief, I believe that my conversations have also been recorded by the State of New York or the District Attorney's Office of New York County or the Police Department of the State of New York. I believe that this investigation and the questions to be asked of me are also based in full or in part on that electronic interception.

I, therefore, request that I be advised before a District Court Judge as to whether or not such interception has taken place and, if so, I request that I be advised whether such interception was based on a Court Order and, if so, I request that a hearing be held to determine the validity of that Order and its execution or, in the alternative, any such Order be submitted to this Court for examination. I assert all of these rights under the *Egan* and the *Gelbard* cases.

Extract of Contempt Proceedings as to Petitioner Persico

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

IN THE MATTER

of

ALPHONSE PERSICO.

United States Courthouse
Brooklyn, New York

January 23, 1974
11:05 o'clock a.m.

Before:

HONORABLE ORRIN G. JUDD,

U.S.D.J.

Appearances:

NANCY ROSNER, Esq.,
Attorney for Alphonse Persico

EDWARD J. BOYD, Esq.,
United States Attorney
for the Eastern District of New York

BY: ROBERT DEL GROSSO, Esq.,
—and—
FRED BARLOW, Esq.,
Assistant United States Attorneys

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Mr. Del Grosso: Your Honor, the Government is moving to have Mr. Alphonse Persico—

The Court: Where is he?

Mrs. Rosner: He is present in the courtroom.

Mr. Del Grosso: Your Honor, the Government is moving to have Mr. Alphonse Persico cited for contempt for refusing to answer questions put to him by the Grand Jury.

Your Honor, Mr. Persico was given immunity, which was signed by Judge Bartels.

The Court: He was here before me two weeks ago.

Mr. Del Grosso: Yes, he was, your Honor. At that time, I guess, they wanted certain stipulations, but the Government claimed they were premature, and this time the Government is stating to the Court, and we have the Grand Jury Reporter, he is here, that Mr. Persico refused to answer the questions after he was given immunity.

Mrs. Rosner: Judge Judd, Mr. Del Grosso got the jump on me, I have moving papers, and I thought we were having a hearing on my application.

The Court: Well, I haven't anything of yours.

Mrs. Rosner: Well, I will tell you what the basis of our application is, Judge:

Mr. Persico returned this morning, as directed by your

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Honor, • • •

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In August of this year when Mr. Persico was represented by other counsel, a civil action was commenced before Judge Dooling, which is entitled 73-C-1213. In the Matter of Wire Interceptions of Oral Communications of Alphonse Persico, Dolores Persico and Theodore Persico, and at that time, the relief requested was the suppression of the use

in evidence of materials obtained as the result of the unlawful electronic surveillance at Mr. Persico's home during the spring of 1973.

Your Honor, on August 20th, Judge Dooling entered an Order, indicating that the application to suppress was premature because at that point in time there was no intended use in evidence of the matters intercepted—

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Mr. Del Grosso: My reading of Gelbard puts no great burden on the government other than what we have said. There have been three orders. The Vigorito matter is not in question here.

Mr. Persico's civil matter is not in question here. I would say that if a further reading of the statute, if you look at 2520, if there's an order it's a complete defense. There have been three orders in this case.

Mrs. Rosner: May I respond briefly just to clear up some factual contentions? Mr. Persico refused to respond to the question—I assume—some question was put by Mr. Del Grosso. A statement which I prepared for him was read to the grand jury asking to be brought before your Honor in order to make this application and indicating that, of course, he would be bound and would answer any questions if your Honor ordered him to do so after hearing our application.

The specific basis for his refusal to answer and the grand jury stenographer can confirm this since he's sitting in the Courtroom with the minutes, was that he wished to come before the Court to have this matter referred to Judge Dooling and to make his motion to suppress pursuant to Judge Dooling's decision both in the civil matter which

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Mr. Persico initiated and the Vigorito case which does not involve Mr. Persico which is the identical situation we have here.

Mr. Del Grosso: The Vigorito matter is not the same thing in that Mr. Vigorito was not granted immunity. We're here strictly on a contempt issue. That's what the government is asking for. We weren't here to determine whether or not—at least the government, to find out whether or not Judge Dooling is to continue this case on a civil matter. We came here on a contempt situation.

Mrs. Rosner: Mr. Del Grosso points something out which has to be met. The subpoenaed person in Vigorito was asked for voice exemplars which, of course, are not covered by the Fifth Amendment under Dionisio and Maia.

There was no need to confer immunity. There's nothing suggestive in Gelbard or any of the cases, including Calandra that a valid objection to testifying on the basis of 18 United States Code 2515 is wiped out by a grant of immunity and in fact, the petitioners in the Gelbard case had, of course, been given immunity and nevertheless were held not to be in contempt because they had a valid statutory basis for refusing to answer. Immunity has nothing

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to do with the objection here.

The Court: Let me hear the grand jury reporter.

David Radzikowski, having been duly sworn by the Clerk of the Court, testified as follows:

Direct Examination by Mr. Del Grosso:

Q. What is your occupation? A. Grand jury stenographer.

Q. Were you the grand jury stenographer for the instant case we're before the Court now; that is, with Alphonse Persico? A. Yes, I was.

Q. Approximately 10:30 this morning? A. Yes sir.

Q. Now, if possible, I think, was Mr.—do you have the transcript with you, sir? A. Yes, I do for the entire grand jury section.

Q. If possible, since it's short, could we have you read it on the record. Was Mr. Persico granted immunity? A. Yes sir.

Mrs. Rosner: I have no objection to the reporter reading the minutes.

The Court: Was he sworn?

The Witness: Yes.

The Court: Read the minutes.

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The Witness: The entire minutes?

The Court: Yes.

The Witness: The witness having been sworn in before the Foreman of the grand jury has testified as follows:

"Question: Could you state your name for the ladies and gentlemen of the grand jury?

"Answer: Alphonse Persico.

"Question: Where do you reside?

"Answer: 1409 Bath Avenue, Brooklyn.

"Question: Are you represented by counsel?

"Answer: Yes.

"Question: Who is that?

"Answer: Nancy Rosner.

"Question: Is she outside this grand jury room?

"Answer: Yes.

"Question: Mr. Persico, are you employed?

"Answer: I refuse to answer that under the ground my answer may tend to incriminate me.

"Question: You refuse to answer then on the ground it may tend to incriminate you?

"Answer: Yes.

"Question: I have a copy of an order signed by Judge John Bartels. It is signed September 28th,

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1973. This order states that it will give you immunity. By this we mean, sir, you have youth immunity. By that I mean everything you say cannot be used against you in a Court of law. The only thing that I can tell you, sir, is that if you refuse to answer the questions stated to you you will be cited for contempt and immediately incarcerated and, of course, if you like to answer the questions that are given here today, you may. Do you understand that, sir?

"Answer: Can I speak to my counsel about this.

"Question: Oh, yes, please do."

At this time, Mr. Persico left the grand jury chamber to consult with counsel.

"Question: I repeat the question, are you employed?

"Answer: I wish to be brought before the Judge so that I may move to suppress evidence deriving from unlawful electronic surveillance of my home. I rely on Sections USC Section 2515, FRCP Rule 41-F in the decision of Honorable Judge Dooling in the matter of the grand jury of Fred Vigorito. I wish to do so before answering any questions. I

fully intend to comply with any lawful order of the Court to answer

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The Court: What has that to do with any illegal surveillance?

Mrs. Rosner: Your Honor, we believe that the Government has not denied that the questions which are going to be propounded to Mr. Persico, and in fact his very subpoena here as a Grand Jury witness, results from the electronic surveillance of his home in the spring of this year.

The Court: That has nothing to do with his answering whether he was employed. I find he was in contempt. I'll sentence him to jail for sixty days.

Mrs. Rosner: May I be heard?

The Court: Yes.

Mrs. Rosner: I believe, your Honor, that the interceptions at his home in fact related to his employment, and perhaps unlawful employment in various gambling enterprises, so that the question, "Are you employed" may in fact, and we believe it does, derive from the interception of his communications at his home; the spring of this year.

Pursuant to the Vigorito decision, and relying on 2515, and Rule 41-F, we would move to suppress the questions and answers before the Grand Jury on the ground that they derive from that electronic surveillance.

The Court: Mr. Del Grosso?

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Mr. Del Grosso: Yes?

The Court: Did you need electronic surveillance in order to make it pertinent to your inquiry whether he was employed?

Mr. Del Grosso: There are questions that have been formulated as a result of electronic surveillance which will deal with his employment. Yes, that is true, your Honor.

If I may go and say one thing, a little bit going into the matter which has been brought before the Court dealing with Mr. Vigorito—

The Court: It doesn't relate to this question, further questions that may be asked. It seems to me the application is premature.

Mrs. Rosner: If I may be heard further, your Honor, I think the Government has indicated enough to show that the application which we are making is not for the purpose of delay, and it is not frivolous, Judge. We have a serious contention here that the entire line of inquiry which the Government proposes, derives from the bugging of Mr. Persico's home.

The Court: Let him go back and find out what the questions are.

Mrs. Rosner: May we, since we are before the Court, in an effort to save time, have the Govern-

ment indicate to the Court the matters which it intends to inquire into?

The Court: I think the proper way is for Mr. Persico to be asked the questions, and see whether they do relate to this. Meanwhile, let me have the Orders, and I will sentence him to contempt for sixty days for refusal to answer a perfectly normal question.

Mrs. Rosner: He will return and answer pursuant to your direction.

Mr. Del Grosso: They are in the Clerk's Office, in the custody of the Clerk.

The Court: Let's have him go back to the Grand Jury Room and see what the questions are.

Mrs. Rosner: We certainly will, your Honor.

Mr. Del Grosso: I have a feeling we'll be back, too.

(Time Noted: 11:30 o'clock A.M.)

(Time Noted: 12:00 o'clock P.M.)

Mr. Del Grosso: A further question has been asked as to the employment, your Honor. Mr. Persico again refused on the ground, this time the ground that the question was formulated as a result of illegal electronic surveillance. The Government's position is that it is not formulated as a result of illegal electronic surveillance; however, the ques-

tion has been asked with the electronic surveillance in mind.

The Court: What was the question?

Mr. Del Grosso: The question was any other further employment. I did get one place of employment, and after that, no others.

Mrs. Rosner: Judge, rather than characterizing, since we again have the services of the Grand Jury Reporter, I would suggest we have the brief transcript.

The Court: Have him come up.

Mrs. Rosner: We'll waive all the qualifications.

Mr. David Radzkowski, having been previously sworn, resumes the stand to testify as follows:

The Court: Please read the testimony; go ahead.

The Witness: The entire minutes?

The Court: Just from where the question was asked.

The Witness: Very well.

"Question: Are you employed at any other occupation, or do you own any other businesses?"

Mrs. Rosner: May I suggest, Judge, we begin with the questions preceding that, relating to employment?

The Court: From where you began, after you read this morning.

Mrs. Rosner: Thank you, Judge.

The Witness: Very well.

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The witness having been reminded by the Foreman of the grand jury he's still under oath,

"Question: Mr. Persico—"

Mr. Persico asked to make a statement.

"The Witness: About this immunity, how does this affect me in any prosecution with federal or state about questions asked here?

"Mr. Del Grosso: Any testimony that you give here today cannot be used against you in any federal or state Court.

"The Witness: Is that with the Internal Revenue and everything?

"Mr. Del Grosso: That's right across the board. Anything you say today cannot be used against you.

If the government should show independent evidence; that is, evidence independent of your testimony that can be used, however, anything you say cannot be used against you at any subsequent date that you may come before this grand jury. Do you understand that?

"The Witness: Yes.

"Question: Are you employed, sir?

"Answer: Yes.

"Question: Where?

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"Answer: DACS.

"Question: Do you go there very often?

"Answer: No.

"Question: Can you estimate the number of times you go there, weekly or don't you even go there weekly?

"Answer: No, I don't go weekly. Once in a while.

"Question: When you say, 'once in a while,' what do you mean by that, once every two or three months?

"Answer: Yes.

"Question: What is your salary?

"Answer: It depends upon how much we earn. We have a slow season and a busy season.

"Question: Can you estimate your gross salary?

"Answer: I would have to look at my records.

"Question: Do you keep a firm hand on the business?

"Answer: My brother.

"Question: What is your brother's name?

"Answer: Theodore.

"Question: Is Theodore there all the time?

"Answer: Every day.

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"Question: Does anybody else work there in a management position or in a managerial position?

"Answer: Al Green runs it there sometimes.

"Question: Is that a half ownership or a total ownership?

"Answer: Total ownership.

"Question: Are you employed or do you own any other establishments?

"Answer: I don't understand the question.

"Question: Are you employed in any other occupation or do you own any other businesses?

"Answer: I think that comes from the electronic devices that will have to go to the Judge. That's from the bugging of my house. I think that question comes up there.

"Question: Are you saying that the question that has been posed to you is a result of electronic surveillance?

"Answer: Yes."

That is the end of the testimony, your Honor.

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The Court: Let me look at them [the orders] to see and Mrs. Rosner to see if there is any basis for invalidity.

Mrs. Rosner: That's all we ask.

First of all, the government states on the record the orders have been signed by the Judges named on the dates. There's one day here—

Mr. Del Grosso: I made a mistake as to the date, April 13th. They have been sealed, in custody of the Clerk. The government states this is sufficient by saying there has been an order, signed. It gives specifics. If there is to be a determination as to whether or not there was probable cause for these interceptions, we would respectfully ask that you alone, in camera, would determine the issue because of the type of situation, the type of investigation there is. It's highly sensitive material in those orders in the affidavit, the accompanying affidavits and this investigation would be just destroyed as a result of that being made available to the witness.

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Mrs. Rosner: May I suggest, your Honor, the relief we're asking for is exactly that which Judge Dooling granted to the petitioner in Vigorito, your Honor, and I would note, your Honor, that Judge Dooling ordered orders and affidavits turned over to counsel on the proviso that the matter not be made known to the persons who are the subject of the subpoena, holding that this adequately protected their right to have counsel make an enlightened determination whether in fact there was a valid motion to suppress. That's all we're asking.

I don't think Mr. Del Grosso is even suggesting if the Court place that kind of proviso on the use of the materials, it would be violated as it certainly would not. That's all we're asking, Judge.

Mr. Del Grosso: I don't think the statute had an objective that a defense attorney would be in the position of an appellate judge. If we must have an inspection, I would respectfully ask your Honor to

determine whether or not there was probable cause. I'm in no way impugning the honesty or ethics of Mrs. Rosner.

I think, across the board, it would be only fair to have only the judge, the miscellaneous judge, who is hearing the motion, look into the matter . . .

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Mrs. Rosner: It falls on my shoulders, not the Court's. I wish it could fall upon the Court's to advise the petitioner in this matter whether he has just cause to refuse to answer because unlawfully electronic surveillance is employed.

Under 2515, of course, that is just cause. He has the right to, at his peril, have his counsel's determination to advise him whether there has been unlawful electronic surveillance.

The Court: He doesn't go to jail if the order is invalid. He just has to answer questions.

I'll grant Mr. Del Grosso's motion. I'll look at the orders in camera. I'll seal them and the Court of Appeals can look at them.

Mrs. Rosner: May I be heard further?

The Court: Yes.

Mrs. Rosner: The concept which Mr. Del Grosso advances that an in camera inspection is sufficient to protect the petitioner's rights was exactly the position rejected by the court in Alderman. This situation is no different—

The Court: Alderman was a trial of Mr. Alderman.

Mrs. Rosner: Alderman arose in the context of the defendant's request to know whether there had been unlawful electronic surveillance.

The Court: It wasn't Grand Jury witness case.

Mrs. Rosner: For purposes of the analysis, it's no different. It helps the petitioner naught to have

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another District Judge pass on orders which have obviously one District Judge as passed upon by signing them.

The Court: If I find they are adequate and I direct Mr. Persico to answer and put him in jail, you can get a stay from the Court of Appeals while the Court of Appeals judges look at the order.

Mrs. Rosner: May I suggest, your Honor, I think the entire thrust of Judge Dooling's opinion in the Vigorito matter is that under 41(f), the defendant does not have to wait—I'm sorry—the petitioner does not have to wait to be held in contempt to have his remedy by way of a motion to suppress.

A motion to suppress can be made at any time; that there is a suspected or intended use of unlawfully obtained materials.

We don't have to wait to be held in contempt. 41(f) is applicable at any point, pre- or post-indictment. Pre- or post-subpoena.

Whenever an unlawful use is intended by the Government, you can move to suppress and a motion to suppress means that the petitioner has the right to be represented by counsel and to have counsel analyze the materials upon which the motion is predicated, not, most respectfully, the District Judge. . . .

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[Mr. Del Grosso]: If it has to be done, we want it in camera. We respectfully rest upon your judgment.

The Court: The Gelbard case is unusual limitation on the duty of a Grand Jury witness to testify. The Gelbard case has been limited by the Collandra case.

Mrs. Rosner: I don't think for this reason. Collandra, in a footnote, specifically exempts from the coverage of the opinion the object of the Grand Jury witness based on 2515, as Judge Dooling points out in his opinions denying the Government's motion to reargue in the Vigorito matter.

Collandra [sic] is exclusively a Fourth Amendment case. It does not reach the scope of the statutory remedy provided by 2515. It specifically exempts reaching that point in a footnote of the opinion

The Court: Rule 41(f) says that a motion to suppress evidence may be stayed in the court of the District of trial, as provided in Rule 12. We are not at this stage of trial.

Mrs. Rosner: Any notations [sic] to Rule 41(f) are absolutely clear on motions to suppress that motions can be made any time. . . .

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[The Court]: The Order provided for minimization of interceptions. The Affidavit shows probable cause to believe there were violations of law occurring. Adequate grounds to support the beliefs. A fair basis for saying that there was a necessity for something other than normal means of obtaining information, that the telephone was used so seldom that the oral interceptions was necessary.

The application is supported by an authorization from Attorney General Kleindienst to Assistant At-

torney General Peterson, and a letter from Assistant Attorney General Peterson to Mr. Dillon. The April 9th Order was a similar Order, based on a similar application, Affidavit, Authorization and letter.

The extension was granted because it would have been impossible to install the necessary equipment and monitor all conversations in the interim. Since the next Order was not entered until April 8th, I also unsealed the envelope with tapes, and I find the last tape under the April 9th Order was dated April 24, which was within the fifteen days permitted.

The May 8th Order of Judge Neaher was based on a similar application, Affidavit and authorization.

I did not find a letter from the Assistant Attorney General Peterson to Mr. Dillon, but I'm not sure that

such a letter is necessary.

Mr. Barlow: That letter would be just a letter notifying Mr. Dillon that Mr. Kleindienst had authorized. It's superfluous.

Mr. Del Grosso: I have a copy of it, I'm sure, your Honor.

That was sent over— We have a copy attached to the affidavit Order in application. The original would be down in my office; however, that was sealed prior to my getting the Order through the mail.

If I may, I can probably point it out to your Honor.

The Court: The authorization from Attorney General Kleindienst says, "Pursuant to the power conferred on me, I hereby authorize the above-described application to be made by investigative or law enforcement officers of the United States as defined in

Section 2510(7), of Title 18, United States Code." I would think that includes Mr. Del Grosso and Agent James W. Nelson, so I think there is adequate basis for it.

Now, I also am satisfied, from reading the Affidavit and applications that there are sufficient mention of other names in continuing investigation, and other facts that pre-indictment discovery of the information in those Affidavits and applications even to the

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counsel for a witness would be improper. Counsel for a witness is in a much different situation from counsel for a defendant. All the witness has to do is answer questions. He's been granted immunity.

If the Order is invalid as found by some other Court at some other time, the immunity is nevertheless good, and I don't think that the Delbard case meant anything more than that. Therefore, I will direct the witness to answer the question.

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Mrs. Rosner: May I be heard further?

The Court: Yes.

Mrs. Rosner: I guess Mr. Del Grosso is very happy with the state of affairs as they existed and didn't want to hear any more. I don't quite understand, Judge, are you entertaining at this point a motion to suppress?

The Court: I'm entertaining it and denying it.

Mrs. Rosner: We haven't had an opportunity to make that motion.

The Court: I heard it this morning.

Mrs. Rosner: I have not had an opportunity to examine the materials.

The Court: You're not entitled.

Mrs. Rosner: I can't move to suppress. For instance, Judge, there might very well be, upon counsel's examination of the affidavits, arguments to be advanced concerning the case or other matters which the Court simply is not an advocate—

The Court: That argument should be made on the trial of any defendant indicted, not on the obstructive action of a witness who should testify before the grand jury.

Mrs. Rosner: These proceedings are not made for the purpose of obstruction or delay.

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The Court: I don't care what the purpose is. The effect is to delay grand jury investigation. I'm satisfied it is not the purpose of the United States Supreme Court to have long interruptions of grand jury investigations.

Mr. Del Grosso: Will they be sealed today?

The Court: They will be resealed. Let me just state this. I have not examined—

Mr. Del Grosso: Those are probably five and ten day reports, your Honor.

The Court: About ten or eleven envelopes of tapes and reports because I thought all I was concerned with was the validity of the initial orders.

Mrs. Rosner: I would like to make our position for the record clear, your Honor. What we are asking for is an opportunity for counsel alone to examine the orders and supporting affidavits in order to make an intelligent argument to the Court concerning why the evidence seized and the fruits of it

which may be used before the grand jury should be suppressed.

The notion that such a motion is satisfied by an in camera determination by the Court, it seems to me was rejected by the Court in the United States against Alderman. This simply is not a motion to suppress.

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The Court: Alderman was a criminal case. This is a grand jury witness and he does not have the same rights as a defendant in a criminal case.

Mrs. Rosner: The principle is the same, Judge. I can't move to suppress by not knowing what the materials are.

The Court: If you have not made a motion, I do not deny it. I direct Mr. Persico to answer the questions or be held in contempt.

Mr. Del Grosso: That will continue at 2 o'clock.

Mr. Barlow: Thank you very much.

(Time noted 1:00 o'clock p.m.)

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(The following occurred at 2:50 p.m.)

* * * * *

The Court: Where are we at now?

Mr. Del Grosso: Your Honor, the Government renews its motion to cite Mr. Persico for contempt for refusal to answer the question put to him by the Grand Jury. He has refused to answer.

The Court: All right. Let me hear the court reporter again.

Mr. Del Grosso: Do you want to hear the whole thing, your Honor?

The Court: As much as you think is necessary for me to make a finding.

Mrs. Rosner: It's very brief, Judge. We have just a few questions.

The Court: Read it all, then.

I take it you resumed sometime around 2:00 o'clock, after the Grand Jury returned?

Mrs. Rosner: About 2:25, your Honor.

The Court: Yes.

Mr. Del Grosso: Take it from where we started.

The Reporter: From this afternoon?

Mr. Del Grosso: Yes.

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"At this time the question was read back.

"Answer: I—you take them off the street corner. People take bets, you know. So there is really no place, in the house maybe, they'll take it in one day.

"Question: Are you the boss of this organization?

"Answer: Yes.

"Question: Do you have people working for you?

"Answer: Yes.

"Question: You do?

"Answer: Yes.

"Question: Who are these people?

"Answer: I guess we have to go back to the Judge again.

"Mr. Del Grosso: Okay. We'll go upstairs to the Judge.

"Whereupon, Mr. Del Grosso and Mr. Persico left the room and reentered the room without going up to the Judge.

"Question: The question was, who were the individuals who worked for you?

"Answer: Can I read this into the record?

"Question: Yes, you may.

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"Answer: You already told me that my house was bugged last spring.

"Mr. Del Grosso: Yes.

"Answer: Now you're asking me who works for my gambling business. You know the answer to that question as a result of electronic surveillance of my home. As a result of electronic surveillance, I feel you're only asking me, for me to refuse to answer, because you know this information from the electronic surveillance in my home.

"I still maintain that the electronic surveillance of my home was unlawful and should not be permitted and you should not be permitted to ask me these questions.

"Question: Is that it?

"Answer: Yes.

"Question: I again ask you, sir, who are the individuals that work for you, and are you refusing to answer that question?

"Answer: Yes.

"Question: I ask the Grand Jury foreman to order the witness to answer that question.

"The Foreman: You are hereby ordered to answer the questions under the terms of the power of

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the grant of immunity and the power of the Grand Jury.

"Answer: Immunity pertains to only me. Is that so?

"Question: That's so.

"Answer: It does not pertain to anybody else?

"Mr. Del Grosso: No, it does not.

"Whereupon Mr. Del Grosso and Mr. Persico then left the Grand Jury chamber and reentered.

"Question: The question was, who are the individuals involved in the gambling operation, and do you refuse to answer? You were ordered to do so. You were ordered to do so by the Grand Jury foreman. Is that not correct?

"Answer: Yes.

"Question: Are you going to give us those names, sir?

"Answer: Before answering this question, I would like to know whether or not, if I am correct, that you already have this information as a result of illegal bugs in my home.

"Mr. Del Grosso: I need not answer any such question. You have been ordered to give those names. If you will give those names, you will not be brought up before the judge. If you will not answer, we will have to go to the judge.

"You are going to have to go to the judge, sir?

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Is that it, sir?

"Answer: Yes, let's go to the judge."

Mr. Del Grosso: May—

The Court: All right. You have really one test question here.

Mr. Del Grosso: "Who are the individuals?"

The Court: Which does seem to be pertinent.

Mrs. Rosner, apart from the questions I have ruled on this morning, is there anything else you want to say?

Mrs. Rosner: Yes.

I believe that Mr. Del Grosso is in possession of the information which he now seeks to elicit from Mr. Persico, for these reasons, your Honor.

Upon information and belief, the Government has intercepted conversations of Mr. Persico and other individuals, the identification of those individuals is clear and explicit on the electronic surveillance which the Government has. There really is no purpose to this question, except to have the witness either commit a contempt or perjury, Judge.

The Government has no need for this information. They already have it out of Mr. Persico's own mouth, as a result of the electronic surveillance.

The Court: Isn't the Government entitled to have

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it produced before the Grand Jury?

Mrs. Rosner: I don't think so, Judge.

The Court: All right. You have another question to go up on.

Mrs. Rosner: As a matter of fact, Judge, they can introduce, since they take the position that their surveillance was lawful, they can introduce the fruits of their electronic surveillance as evidence before the

Grand Jury, to prove the matters which they now simply seek to have reiterated through Mr. Persico's mouth viva voce before the Grand Jury.

The Court: All right. I do not think that is an excuse.

I find him in contempt. I will sentence him to 60 days in jail.

Mr. Del Grosso: Beginning now?

The Court: Beginning now.

Mrs. Rosner: Your Honor, I don't think your Honor can do that, under Rule 42(b) . . .

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The Court: You will have a hearing tomorrow at 2:00. He will be remanded, in the meantime.

Mrs. Rosner: I would—

Mr. Del Grosso: Your Honor—

Mrs. Rosner: I don't think he can be remanded for this reason.

Mr. Del Grosso: Your Honor—

The Court: I am remanding him.

Mrs. Rosner: If I may, your Honor?

Mr. Del Grosso: I—

Mrs. Rosner: If I may be heard?

I think the import of Bryant and Wilson is that before a citation or any action in the way of contempt may be taken, the witness must have an opportunity to prepare a defense to the proceedings . . .

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

IN THE MATTER

of

ALPHONSE PERSICO.

United States Court House
Brooklyn, New York

January 24, 1974
2:00 P.M.

Before:

HONORABLE ORRIN G. JUDD,

U.S.D.J.

In Re: Grand Jury

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Appearances:

EDWARD J. BOYD, Esq.,
United States Attorney
for the Eastern District of New York

BY: ROBERT DEL GROSSO, Esq.,
—and—
FRED BARLOW, Esq.,
Assistant United States Attorneys

NANCY ROSNER, Esq.,
Attorney for Alphonse Persico

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The Court: Do you have any other questions?
Mrs. Rosner: Your Honor, this afternoon the de-

fendant would move—would renew his motion made yesterday to suppress, pursuant to Rule 41, both the questions put to him and the answers which he made, on the ground that they are the fruits and exploitation of the unlawful electronic surveillance conducted at his home in the spring of this year.

The Court: We had a little dispute yesterday, I said you had made oral motion, which I denied, and then you said you had not made the motion.

Mrs. Rosner: No, I did not.

The Court: Now you say you are renewing.

Mrs. Rosner: If I said that, your Honor, I misspoke myself.

I certainly did intend to make that motion, and I intend to renew it today, your Honor.

The Court: Then go ahead.

As I said yesterday, I reviewed the matters, it took me not ten minutes, which I had adjourned, it took me about twenty-five minutes to go through what I thought was an adequate way.

Mrs. Rosner: Your Honor, as I understand the law, putting aside for a moment the issue of whether prior to being held in contempt a subpoenaed person

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has a right to any sort of motion to suppress, it seems to me clear that once—

The Court: I granted you that.

Mrs. Rosner: Once there is a contempt proceedings, certainly by way of defense the individual held in contempt has the right to move to suppress the questions put to him on which there is a refusal to answer, and of course the suppression of such ques-

tion would result in a dismissal of the contempt proceedings.

And in that vein, your Honor, we renew our motion to suppress.

In line with that motion, I would make application for the wiretap Orders and supporting affidavits to be turned over.

The Court: I denied that yesterday, I continue in that view.

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The Court: You are asking me to review a coordinate Judge which I think I could not do properly.

I think the proper place to determine whether I was wrong in following Judge Bartels and Judge Neaher is the Court of Appeals.

I will deny that.

Mr. Del Grosso: Thank you, your Honor—

Mrs. Rosner: I agree, your Honor, but I think we are entitled to bail for that proceeding.

Mr. Del Grosso: Thank you very much, your Honor.

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Mrs. Rosner: Well, that is purely punitive, your Honor.

The Court: No, it is coercive.

Mrs. Rosner: While Mr. Persico is in the courtroom—Mr. Del Grosso, Mr. Del Grosso, there is one other thing, I am sorry.

Mr. Del Grosso: I am sorry.

Mrs. Rosner: While Mr. Persico is in the courtroom, your Honor, I would like to make it clear that in addition to the ground stated at the time he refused to answer, he also relies, although I am aware of the Castega case, on the grounds that the immunity extended to him as explained to him, is not commensurate with his Fifth Amendment privilege.

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Extract of Contempt Proceedings as to Petitioner Langella

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

In the Matter

—of—

Grand Jury

JERRY LANGELLA

United States Courthouse
Brooklyn, New York

April 17, 1974
11:10 o'clock a.m.

Before:

HONORABLE JOHN F. DOOLING, JR.,
U.S.D.J.

Appearances:

EDWARD J. BOYD V, Esq.,
United States Attorney
for the Eastern District of New York

By: ROBERT DEL GROSSO, Esq.,
Assistant United States Attorney

GUSTAVE H. NEWMAN, Esq.,
Attorney for Jerry Langella

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The Court: Yes Mr. Del Grosso.

Mr. Del Grosso: Your Honor, the witness is Jerry Langella. Mr Langella was sworn. He gave his name and address and I asked him if he was represented by counsel and I put that on the record as to counsel and he asked to read a statement. In that statement are questions I think your Honor has seen before concerning electronic surveillance and at this point I imagine Mr. Newman would like to make his application. He wanted to get this out of the way first.

Mr. Newman: If your Honor please, at this time I would like to offer up the statement, copy of which Mr. Langella read before the grand jury.

Mr. Del Grosso: Your Honor, I would say this application is premature in that no questions have been put to the witness at all. In Egan and Gelbart cases it is after immunity has been granted. No immunity has been granted in this case although there will be.

There is a claim, really not a claim as to the illegality of the electronic surveillance. There is a claim of finding out whether or not it is legal or illegal and this really can be settled by a previous matter, United States versus Alfonse Persico. In fact, Judge Judd found that these orders, these very same

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electronic surveillance we are talking about in this matter they were valid orders and that the Second Circuit Court of Appeals found they were valid orders. Now we are going through the same thing

and I really believe it should not be gone through now.

Mr. Newman: Before this witness and I trust he is being brought here as a witness, although I have heard nothing—

Mr. Del Grosso: He is a witness.

Mr. Newman: Before this witness can decide whether he should or should not assert any fifth amendment privilege he is asking a question by that statement. He is not questioning the validity of any orders, he is asking the question, has my voice been recorded. I think Egan and Gelbart give him that right. They do not go into the question of whether it is premature prior to the assumption of a fifth amendment privilege.

The only thing Egan and Gelbart dealt with on the fifth amendment privilege, Judge, was the question as to whether the fellow was in contempt if after asserting his fifth amendment privilege or her fifth amendment privilege in the case of Egan, she was conferred or granted the use of immunity, whether she could still assert the electronic surveillance as to

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a contempt proceeding.

All we are asking Mr. Del Grosso in this statement, all the witness is asking is to be advised whether or not his voice was electronically intercepted and whether that interception was the basis for this grand jury proceeding.

It is significant for him to determine whether he should assert his fifth amendment privilege or not assert his fifth amendment privilege. I do not see how it can be premature.